No. 06-268

IN THE
Supreme Court of the United States

PORT AUTHORITY OF ALLEGHENY COUNTY,
Petitioner,

v.

DANIELLE STANGL
and YVETTE KOERNER,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit should have held that the Port Authority of Allegheny County is an arm of Pennsylvania for Eleventh Amendment purposes because a state statute refers to it as a state agency and Pennsylvania provides approximately 60% of its non-federal funding, even though the Port Authority is a separate corporate body that can sue and be sued and make contracts, its board of directors is appointed locally, it has multiple sources of funding besides the Commonwealth, and it cannot hold Pennsylvania liable for any judgment against it.

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INTRODUCTION

"Only States and arms of the State" possess sovereign immunity under the Eleventh Amendment. *Southern Ins. Co. of N.Y. v. Chatham County*, 126 S. Ct. 1689, 1693 (2006). In determining whether an entity is an "arm of the State," or whether it is "more like a county or city" not entitled to immunity, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), this Court considers multiple "indicators of immunity or the absence thereof," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994), including how much control the state has over the entity, whether its implementing legislation considers it a state agency, and whether a judgment against the entity would be paid out of the state treasury. *Id.* at 44-48. The decision below followed this Court's guidance in *Hess* and used a multi-factor analysis to conclude that the Port Authority of Allegheny County is not an arm of Pennsylvania for Eleventh Amendment purposes.

In its petition for certiorari, Petitioner dismisses the *Hess* analysis, claiming that *Hess* has been "subsumed under the preservation and respect due to States as sovereign entities." Pet. at 12. It argues that there is a conflict between the decision below and this Court's statements in later cases that the main purpose of sovereign immunity is to provide dignity to the states. The later cases cited by Petitioner, however, do not consider whether entities are arms of the state and in no way overturn *Hess*. And Petitioner's invocation of the broad principles behind sovereign immunity cannot obscure the fact that the Third Circuit properly applied the standards this Court has used to determine whether an entity is an arm of the state for Eleventh Amendment purposes.

Petitioner also claims that the Third Circuit misapplied *Hess* to the facts of this case and created a conflict between the circuits by denying immunity to the Port Authority of Allegheny

County even though Pennsylvania provides the entity funding pursuant to state law. But Pennsylvania's voluntary provision of approximately 60% of the Port Authority's non-federal budget in a given year does not place the same type of obligation on Pennsylvania to pay judgments against the entity that this Court, in *Hess*, and lower courts, in the cases cited by Petitioner, have found can help cloak an entity with the state's immunity.

In short, the Court of Appeals' opinion neither conflicts with this Court's precedents nor with the lower court decisions cited by Petitioner. The Third Circuit correctly concluded that the Port Authority of Allegheny County is not an arm of Pennsylvania entitled to the state's sovereign immunity, and certiorari should be denied.

STATEMENT OF THE CASE

In July 2002, respondents Danielle Stangl and Yvette Koerner, employees of the Port Authority of Allegheny County's Transit Police and Security Department, sued the Port Authority and the chief of its police department, contending that they were denied positions as police officers due to gender discrimination and retaliation. Shortly before the case was to go to trial, the Port Authority filed a motion claiming it was a state entity that was immune to suit under the Eleventh Amendment. Pet. App. 8a-10a.

The district court denied the motion, applying a three-pronged test that looked at: (1) whether the money that would pay the judgment would come from the state; (2) the status of the agency under state law; and (3) the agency's degree of autonomy. *Id.* 14a-15a.

Focusing on the first prong, the court rejected the Port Authority's argument that it met that prong simply because it received approximately 60% of its non-federal funding from the state. "To give too much weight to the mere proportion of funding" the court stated, "would make Eleventh Amendment immunity dependent on the whim of the state legislature." *Id.* 18a. The court found instead that "the most telling factor" was "whether the Commonwealth is obligated to pay the judgment or any indebtedness of the Port Authority." *Id.* Noting that Pennsylvania had no such obligation, it concluded that the first prong weighed against immunity. *Id.* 19a.

The court then determined that the second prong (status under state law) weighed in favor of immunity and that the third prong (degree of autonomy from the state) weighed against it. Overall, it held that the Port Authority was not an arm of the state entitled to immunity under the Eleventh Amendment. *Id.*

In an unpublished opinion, the Third Circuit affirmed, "substantially for the reasons set forth in the District Court's well-reasoned opinion." *Id.* 5a.

REASONS FOR DENYING THE WRIT

I. In Using A Multi-Factor Analysis To Determine Whether The Port Authority of Allegheny County Is An Arm Of Pennsylvania, The Decision Below Followed The Analysis This Court Uses In Determining Whether An Entity Is Entitled To The State's Immunity.

Petitioner's primary argument for certiorari is that if a state creates an entity, gives it money, and says it is a state agency, federal courts must hold that the entity is entitled to

immunity or else they are offending the state's dignity and thereby disregarding this Court's statements that a primary purpose of sovereign immunity is to accord dignity to the states. Even if Petitioner's depiction of Pennsylvania law's view of the Port Authority of Allegheny County were complete, which it is not, as discussed in section III below, that according respect to the states is a central purpose of sovereign immunity does not mean that state law's view of whether an entity is a state agency is dispositive under federal law. To the contrary, this Court has looked at multiple factors concerning the entity's structure and its relationship with the state in determining whether an entity is an arm of the state for Eleventh Amendment purposes.

The decision below followed this Court's analysis in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). There, although the Court explained that the Eleventh Amendment "emphasizes the integrity retained by each State in our federal system," *id.* at 39, it considered a variety of factors in determining whether the Port Authority Trans-Hudson Corporation (PATH) was an arm of the state. In addition to looking at whether state law considered the entity a state agency, the Court examined indicators of state and local control, whether the entity's functions were state or local, whether the state was financially responsible for the entity, and whether the state bore liability for the entity's debts. *Id.* at 44-46. After finding that these factors pointed in different directions, the Court noted that "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* at 48. It went on to explain that the proper focus, in determining whether an entity is an arm of the state, should be whether "the State [is] in fact obligated to bear and pay the resulting indebtedness of the enterprise[.] When the answer is 'No' – both legally and practically – then the Eleventh Amendment's

core concern is not implicated." *Id.* at 51. Notably, this Court found that the PATH was not an arm of the state, even though state courts had "repeatedly . . . typed the Port Authority an agency of the States." *Id.* at 44.

Petitioner claims that, by not considering Pennsylvania's creation of the Port Authority and its declarations that the Port Authority is an agent or arm of the state to be "dispositive determinations that Port Authority is entitled to sovereign immunity," Pet. at 9, the Court of Appeals violated *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), and *Alden v. Maine*, 527 U.S. 706 (1999). That is not so. In *Doe*, this Court recognized that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance" in determining whether a state instrumentality may invoke the state's sovereign immunity. 519 U.S. at 430. And *Federal Maritime Commission* and *Alden* do not even discuss the factors relevant to whether an entity is an arm of the state. *See Fed. Maritime Comm'n*, 535 U.S. at 747 (holding that state sovereign immunity applies to adjudications conducted by the commission); *Alden*, 527 U.S. at 712 (holding that Congress does not have authority under Article I to abrogate a state's sovereign immunity in its own state court). Petitioner cites them only because they contain statements about the principles behind the Eleventh Amendment. Petitioners' invocation of these broad principles, however, does not change the fact that the Third Circuit's treatment of whether state law considers the entity a state agency as just one of many factors to examine in determining whether the entity is an arm of the state is entirely consistent with this Court's jurisprudence.

II. The Court Of Appeals' Analysis Of The State Treasury Prong Of The Arm-of-the-State Analysis Does Not Conflict Either With This Courts' Precedents Or With Other Circuits.

Focusing attention on the language in *Hess* that the proper focus of the inquiry is whether the state will be legally or *practically* obligated to bear an entity's debts, Petitioner claims that the Court of Appeals "merely applied one-half of the analysis proffered by this Court in *Hess* to determine the potential threat of a judgment against the Commonwealth's treasury." Pet. at 10. That is not the case.

For starters, the Third Circuit's decision does not say that the state treasury prong of the test can never be met if the state is not legally obligated to bear the entity's debts. To the contrary, it includes "whether payment will come from the state's treasury" and "whether the agency has the money to satisfy the judgment" as two of the three factors to consider in determining whether a judgment would affect the state treasury. Pet. App. 4a. And it cites *Febres v. Camden Board of Education*, 445 F.3d 227 (3d Cir. 2006), Pet. App. 4a-5a, which, while determining that a state's legal obligation merits greater weight than the practical effects of a judgment on the state treasury, also found that "the practical or indirect financial effects of a judgment may enter a court's calculus." *Febres*, 445 F.3d at 236.

Moreover, Petitioner's fixation on the word "practically" causes it to lose sight of the fact that this Court's focus is on whether a state will be *obligated*, legally or practically, to pay a judgment obtained against an entity. *See Hess*, 513 U.S. at 51. Petitioners' sole argument for why the state treasury prong weighs in its favor is that Pennsylvania

voluntarily provides approximately 60% of the Port Authority's non-federal funding and that it has chosen to dedicate a stream of funding to the entity. As the district court pointed out, however, Pennsylvania's voluntary contribution to the Port Authority's budget does not, alone, demonstrate that the Commonwealth would be obligated to pay a judgment against the Port Authority. Nor does Pennsylvania's discretionary contribution to the Port Authority lead to the conclusion that "'as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries.'" *Hess*, 513 U.S. at 50 (quoting *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 227 (D.C. Cir. 1986) (*WMATA*)). In fact, the Port Authority has other funding sources and is authorized to borrow money, issue notes and bonds, and accept grants. 55 Pa. Const. Stat. Ann. § 553(b).

Petitioner makes much of this Court's citation in *Hess* to *WMATA* and *Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.*, 5 F.3d 378 (9th Cir. 1993), two cases in which transportation agencies were found to be immune from suit. Indeed, Petitioner asserts that there is a circuit conflict because these "nearly identical" authorities, Pet. at 5, were granted sovereign immunity even though their states were not legally responsible for their debts. Although the entities in *WMATA* and *Alaska Cargo* were also transportation authorities, however, the relationships they bore with their states differed from the relationship the Port Authority has with Pennsylvania. These differences explain why the entities in *WMATA* and *Alaska Cargo* were granted sovereign immunity, while the Port Authority of Allegheny County was not, and demonstrate the limited circumstances in which a state may be obligated, in a practical but not legal manner, to pay a judgment against an entity.

In *WMATA*, the D.C. Circuit held that the United States Congress, Maryland, and Virginia had successfully conferred immunity on the Washington Metropolitan Area Transit Authority (WMATA), an entity created by interstate compact to run a mass transit system for the greater Washington, D.C. area. 781 F.2d at 220. The court reached this conclusion by considering the multiple factors set out in this Court's cases for determining whether an entity is an arm of the state for sovereign immunity purposes. With regard to whether the state treasury would be obligated to pay a judgment against WMATA, the court noted that, under the terms of the compact that created WMATA, costs that exceeded revenues were to be shared among the federal, District of Columbia, and local governments, and that Congress explicitly made the federal government's contribution "contingent on the local participating governments or Compact signatories providing WMATA with a 'stable and reliable source of revenue sufficient to meet'" WMATA's operating deficits, *id.* at 225-26 (citation omitted), which Maryland and Virginia had done. *Id.* at 226 n.10. The court went on to explain that WMATA could not levy taxes, and that, although it could issue bonds, it could pledge the contracts of the signatory parties as security for those bonds. Under these circumstances, the D.C. Circuit did "not think the payments to WMATA by Maryland and Virginia are aptly characterized as 'voluntary.'" *Id.* at 227.

In *Alaska Cargo*, the Ninth Circuit considered whether the Alaska Railroad Corporation (ARRC) was entitled to sovereign immunity. The court found that the state treasury prong was inseparable from whether the entity performed a central government function. 5 F.3d at 380. Emphasizing the importance of the railroad to the state, given the state's unique geography, the court determined that ARRC did, indeed, perform a central governmental function. *Id.* at 381. It then

noted that state law required ARRC to seek legislative appropriations if subsidies were needed to maintain services that were not self-sustaining, and that federal law required Alaska to provide rail carrier services or else real property conveyed to Alaska when the United States government gave it the railroad would revert to the federal government. Given the confluence of these state and federal laws, the court agreed with the district court that "'if faced with a large money judgment, ARRC would be compelled to turn to legislative appropriation in order to remain in business, and the legislature would have to respond favorably . . . .'" *Id.* (*quoting Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 834 F.Supp. 1216, 1221 (D. Alaska 1991)). The Ninth Circuit then went on to examine whether ARRC could sue and be sued, whether it could take property in its own name, and its corporate status, deciding "on balance" that ARRC was entitled to immunity. *Id.* at 382.[1]

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[1]Petitioner also claims a conflict with *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995), a post-*Hess* case in which the Fourth Circuit held that the South Carolina Ports Authority was entitled to sovereign immunity. There, however, state law provided that South Carolina could withdraw money from the Ports Authority if it found that the money was not necessary or desirable for the Ports Authority's operations, and, over the course of the Ports Authority's life, the state had withdrawn over $1.5 million. Because "the Ports Authority surplus is subject to the unfettered discretion of the South Carolina General Assembly," the court noted, "such 'surplus' was effectively the state's in the first instance," and the legislature would not be able to withdraw such surpluses "if the Ports Authority's operation funds have been depleted by judgments against it." *Id.* at 1054 & n.9.

Although the Port Authority claims that Pennsylvania would be "practically obligated" to pay judgments against it, Pet. at 12, Pennsylvania's voluntary provision of approximately 60% of its non-federal funding does not constitute the sort of obligation referred to in *Hess* and found in *WMATA* and *Alaska Cargo*. In addition, the Port Authority differs from the entities in *WMATA* and *Alaska Cargo* on other of the factors considered in the fact-intensive, multi-factor test used to determine if an entity is an arm of the state. *See, e.g., Alaska Cargo*, 5 F.3d at 382 (unlike Port Authority, ARRC could not issue bonds without legislative approval); *WMATA*, 781 F.2d at 227 (unlike Port Authority, states were represented on WMATA's board of directors). The Court of Appeals' analysis neither misconstrued *Hess* nor conflicts with the circuit court cases cited by Petitioner, and certiorari should be denied.

III. The Third Circuit Correctly Concluded That The Port Authority Of Allegheny County Is Not An Arm Of Pennsylvania.

Application of the factors set forth by this Court in *Hess*, and in the other cases in which it has considered whether an entity is an arm of the state for Eleventh Amendment purposes, *see Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-02 (1979); *Mt. Healthy*, 429 U.S. at 280-81, demonstrate that the Court of Appeals was correct in concluding that the Port Authority of Allegheny is not an arm of Pennsylvania for Eleventh Amendment purposes.

First, although Petitioner stresses that its enabling legislation refers to it as a state agency, 55 Pa. Const. Stat. Ann. § 553(a), it was not so structured under state law. The Port Authority was created as a separate body "corporate and politic in counties of the second class." *Id.* It has a perpetual

existence, can "sue and be sued," and possesses the power to acquire and hold property. *Id.* §§ 553(b)(1),(2), & (5). It can also make contracts "of every name and nature," and is specifically authorized to "enter into contracts . . . with the Commonwealth of Pennsylvania," as well as with the federal government, municipalities, and corporations. *Id.* §§ 553(b)(11) & (12).[2]

"Indicator[s] of local governance," *Hess*, 513 U.S. at 44, further weigh against the Port Authority being considered an arm of the state. The governing body of the Port Authority – its Board of Directors – is appointed by county government, which also determines Board members' compensation. 55 Pa. Const. Stat. Ann. § 556. Allegheny county can only appoint residents of the county to the Board. *Id.* One member of the Board must

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[2]Petitioner also emphasizes that the Pennsylvania Supreme Court has held that the Port Authority is a Commonwealth agency within the meaning of Pennsylvania's sovereign immunity statute. However, "[i]n enacting the sovereign immunity statute, the Pennsylvania legislature merely conferred upon entities . . . by way of statute that which they otherwise lacked, namely, immunity from suit in state court." *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995); *see also Mayle v. Pa. Dep't of Highways*, 479 Pa. 384, 386 (1978) (abolishing common law sovereign immunity in Pennsylvania). The Pennsylvania sovereign immunity statute covers entities that were not immune under common law, *see Toombs v. Manning*, 835 F.2d 453, 459 (3d Cir. 1987), and whether an entity is a state agency under the sovereign immunity statute is not determinative of whether it is a state agency for other purposes. *See James J. Gory Mech. Contracting, Inc. v. Phila. Hous. Auth.*, 579 Pa. 26, 38-39 (2004).

be a member of the County Council. *Id.* The Port Authority itself makes by-laws to manage its affairs; employs its own officers, agents, and employees; and sets its own fares, without state control. *Id.* §§ 553(b)(7), (8), & (9).

Finally, analysis of the effect of a judgment against the Port Authority on Pennsylvania's treasury militates against granting the Port Authority immunity as an arm of the state. The Port Authority's enabling legislation explicitly states that Pennsylvania will not be legally liable for the entity's obligations:

> [The Port Authority] shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth of Pennsylvania or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal or interest on such obligations.

55 Pa. Const. Stat. Ann. § 553(b)(18). Moreover, the Port Authority has many funding sources besides the Commonwealth. It can "borrow money, make and issue negotiable notes, bonds, refunding bonds and other evidences of indebtedness or obligations of the authority, and [] secure the payment of such bonds." *Id.* § 553(b)(10). It can also borrow money and accept grants from the federal government, Pennsylvania, municipalities, and corporations. *Id.* § 553(b)(12). And it can "pledge, hypothecate, or otherwise encumber all or any of the revenues or receipts of the authority

as security for all or any of the obligations of the authority." *Id.* § 553(b)(14). In addition, it receives funding through fare collection, "for the purpose of providing for the payment of the expenses of the authority . . . [and] the payment of the principal and interest on its obligations." *Id.* § 553(b)(9). Given that, according to the record, Port Authority expected to receive close to $100 million from non-Commonwealth sources in fiscal year 2005, *see* Pet. App. 11a, there is no evidence that the Port Authority would be incapable of satisfying a judgment against it with non-Commonwealth funds. Indeed, all evidence points in the other direction.

In sum, Pennsylvania did not structure the Port Authority of Allegheny County in a way that would "enable it to enjoy the special constitutional protection of the States themselves." *Lake Country*, 440 U.S. at 401. The Court of Appeals was correct in concluding that the Port Authority is not entitled to immunity under the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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